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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 1041

IN THE MATTER OF
4145 BROADWAY HOTEL COMPANY,
A CORPORATION,
debtor.

F. GERALD THOMAS AND RALPH C. GOLDING,
petitioners,
vs.
GEORGE W. ROSSETTER, JAY C. McCORD AND MAURICE A. ROSENTHAL, AS TRUSTEES,
respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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THE BLAKELY-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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SUMMARY OF ARGUMENT.

I.

The 1938 injunction order against F. Gerald Thomas.

The injunction order of May 26, 1938 against F. Gerald Thomas was only collaterally involved in the 1940 proceeding—on petition filed by respondents May 2, 1940 (and supplementary petition June 17, 1940)—to determine whether the debtor corporation should make a first mortgage loan of $110,000. In this proceeding the validity of the 1938 injunction against F. Gerald Thomas was not at issue, but only the effect of the injunction on certain powers of attorney from certificate holders sought to be used by Thomas in opposition to the proposed loan.

The contention that the injunction order somehow lost all efficacy on June 22, 1938, therefore could not properly be considered in relation to Thomas' alleged powers of attorney, is frivolous. A temporary injunction was ordered May 5, 1938, then made permanent May 26, 1938. On June 23, 1938 Thomas presented a motion to the district court to dissolve injunction; on June 24, 1938 he prayed an appeal from the injunction in the district court; on July 19, 1938 he procured leave from the circuit court of appeals to appeal from the injunction order; at the October 1938 term of the circuit court of appeals he urged, not that the injunction had become functus officio, but that the entry of the injunction order was erroneous; on February 14, 1939 he filed a petition in the district court to terminate the injunction, which was denied March 20, 1939; thereafter filed a petition in the circuit court of appeals for leave to appeal from said order of March 20, 1939, which petition was denied April 27, 1939. Since April 27, 1939, Thomas has not again applied to the district court to terminate or modify the injunction.

The district court on August 6, 1940 and the circuit court of appeals on February 11, 1941 correctly held that the 1938 injunction was still in full force and effect, there-

fore properly to be considered in relation to the validity of Thomas' alleged powers of attorney.

There is no conflict whatever between the decision rendered by the circuit court of appeals February 11, 1941 (on appeal from the district court order of August 6, 1940) and the decision rendered by the same court October 25, 1938 (on appeal by F. Gerald Thomas from district court injunction order of May 26, 1938).

II.

Jurisdiction.

In the judgment sought to be reviewed, there is not involved any question of the authority of the district court to continue to exercise jurisdiction under the express reservations of jurisdiction contained in the reorganization decree entered March 7, 1935. No objection to the jurisdiction of the court was made in the 1940 phase of the case. On the appeal to the circuit court of appeals from the district court order of August 6, 1940, no point was raised that the district court improperly continued to exercise jurisdiction in the reorganization proceedings.

III.

Personal liberty of F. Gerald Thomas.

The contention of F. Gerald Thomas that his personal liberty is involved cannot possibly relate to the decree of August 6, 1940, affirmed by the circuit court of appeals February 11, 1941, which authorized the debtor corporation to consummate a mortgage loan.

More than two months after the circuit court of appeals affirmed the district court order of August 6, 1940, the respondents filed a petition in the district court charging F. Gerald Thomas with contempt of court (because of acts done by Thomas during March and April of 1941). If the pending contempt petition threatens the personal liberty of F. Gerald Thomas, this is a matter that must await the judgment of the district court on the contempt charges and appeal if any from such judgment.

CASES CITED.

Ashby v. Ashby, 62 N. J. Eq. 618, 50 Atl. 473..... 11
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In the matter of 4145 BROADWAY HOTEL COMPANY, a corporation, *debtor.* F. GERALD THOMAS and RALPH C. GOLDING, *petitioners,* *vs.* GEORGE W. ROSSETTER, JAY C. McCORD and MAURICE A. ROSENTHAL, as trustees, *respondents.*	On petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Although the petition for certiorari is ostensibly directed to the judgment entered by the circuit court of appeals on February 11, 1941 (R. 186), affirming the district court order of August 6, 1940 (R. 159)—an order authorizing the debtor corporation to consummate a mortgage loan of $110,000—the subject primarily discussed in the petition is the injunction order entered by the district court against F. Gerald Thomas, one of the petitioners, on May 26, 1938.

(R. 10.) That order was affirmed by the circuit court of appeals on October 25, 1938, rehearing denied December 14, 1938 (100 F. 2d 7), therefore long past time for further review by this court.

The injunction order of May 26, 1938, as we shall point out, was only collaterally involved in the proceeding instituted by the respondents in 1940. On May 2, 1940, the respondents, as voting trustees of the debtor corporation, filed a petition praying for the entry of an order approving the action of the respondents in causing the corporation to obtain a commitment for a first mortgage loan of $110,000 to be used mainly to dispose of the 1927-1934 tax arrearages of the corporation and in part for rehabilitation of the debtor's property. On this petition, an order was entered by the district court on May 7, 1940 approving the action of the respondents in causing the debtor corporation to obtain the loan commitment (R. 16) and authorizing the respondents to take all steps necessary to consummate the loan, discharge the unpaid taxes and rehabilitate the property. (R. 16.) On June 17, 1940 the respondents filed a further petition (R. 17) reporting the acts already done and the further acts to be done in consummating the mortgage loan and praying for the entry of an order that the respondents as voting trustees, in all acts done toward consummation of the mortgage loan, had acted in accordance with the provisions of the trust agreement dated May 1, 1935, also in accordance with the plan of reorganization approved by the court. By this petition, the respondents presented to the court for approval the various documents to be used in consummating the mortgage loan.

On June 17, 1940, upon the filing of the latter petition, the court entered an order directing that notice of the petition be given (by mail and by publication) to all holders of voting trust certificates of the debtor corporation; grant-

ing leave to any registered certificate holder and any party to the proceeding to file an answer to the petition; fixing the time for hearing on the petition and any answers to be filed thereto. (R. 47.) Answers to the petition were filed by F. Gerald Thomas (R. 50) and by Ralph C. Golding (R. 58). Answers not set forth in the record were also filed by certain nominees or associates of F. Gerald Thomas, namely, Theodore R. Carlus (R. 88, 90, 96) and Alvin Cottrell (R. 92, 93, 100).

District court order August 6, 1940:

The order entered August 6, 1940, on the petition filed by the respondents June 17, 1940, may well be regarded —despite the five-year lapse of time—as a supplement to the decree of March 7, 1935 * confirming the plan of reorganization of the debtor corporation under section 77B of the Bankruptcy Act. (R. 2.) In 1935, in addition to indebtedness on $1,191,000 unsubordinated 1923 first mortgage bonds still outstanding, the debtor corporation was burdened with an accumulation of unpaid real estate taxes for the years 1927-1934 aggregating over $100,000 in principal amount and accruing interest at the statutory rate of 1% per month. The 1923 mortgage bonds were disposed of by exchange for new securities, but in 1935 nothing could be done to solve the ominous liability of the debtor corporation for the unpaid real estate taxes. While this liability remained undischarged, there was no hope of return on the securities of the reorganized company. Thus, the 1935 reorganization was of tentative or preliminary nature, to become practicable only when the problem of the unpaid taxes could be solved.

From 1935 to 1940 the reorganized corporation made substantially no progress in reducing the 1927-1934 tax balances. Not until 1940 did it become possible to procure a mortgage commitment in amount sufficient to dispose of

*Erroneously shown in record as May 7, 1935.

the tax liability and on terms well within the present operating income of the debtor. The $110,000 mortgage loan afforded opportunity to dispose of the old tax arrearages at a very large saving to the debtor corporation, by a compromise settlement of the tax liability negotiated by the respondents with the officers of Cook County, Illinois, in charge of collection of taxes;*—a compromise in no way coerced or influenced by the district court (as insinuated in the petition for certiorari, pp. 6, 8, 14). The mortgage loan also provided a substantial sum for general rehabilitation of the hotel property. Not until consummation of the $110,000 mortgage loan, pursuant to the district court order of August 6, 1940, did the 1935 reorganization become a practicality.

Injunction order May 26, 1938:

The injunction order of May 26, 1938 was only collaterally involved in the 1940 proceeding. F. Gerald Thomas, as the purported holder of powers of attorney from owners of voting trust certificates, contended that—regardless of the merit and vital necessity of the mortgage and tax-payment program—he had an absolute right of veto and proposed to exercise it. The respondents made specific objections to the validity of many of Thomas' purported powers of attorney; but objected generally to the validity of all of said powers of attorney, first, on the ground that they

* The settlement was carried out through a tax foreclosure proceeding instituted by the State's Attorney of Cook County August 22, 1940 in the Circuit Court of Cook County. A decree of tax foreclosure was entered October 16, 1940 adjudicating the amount of tax balances due on the property of 4145 Broadway Hotel Company to the end of the year 1939, including interest, penalties and costs, at $238,491.40 and ordering a sale of the property at public auction in default of payment of said sum. The tax foreclosure sale was held in abeyance until the district court order of August 6, 1940 approving the mortgage loan was affirmed by the circuit court of appeals. Thereupon, at sale held March 12, 1941, the property was bid in for the benefit of the debtor at $85,000, resulting in a saving on the old tax arrearages (together with 1939 taxes) of more than $150,000.

were interdicted by the injunction order of May 26, 1938; second, on the ground that they had been obtained by false representations concerning the financial operations of the company and by the withholding of material information, *viz.:* that while Thomas was pretending to be the disinterested champion of the beneficial owners of the capital stock of the debtor corporation, himself the owner of only 15 shares (as avowed in his sworn pleading filed in the district court as late as June 24, 1940—R. 50), he was in fact engaged in a covert campaign—coupled with his defamatory communications regarding the financial condition of the company—to purchase for his own account several hundred shares of the capital stock of the company at prices from $2.25 down to $1 per share, an average of not more than $1.50 per share.*

In the 1940 hearing on the mortgage loan, the validity of the 1938 injunction against Thomas was not at issue. That question was forever settled by the judgment of the circuit court of appeals sustaining the injunction (rehearing denied December 14, 1938—100 F. 2d 7). In 1940 the question was whether Thomas' powers of attorney, procured and attempted to be used in brazen defiance of the court's injunction, should be given recognition (in relation to the mortgage and tax-payment program, also in relation to the further continuance of the stock voting trust).

Thomas now argues that he procured most of his powers of attorney after June 22, 1938; that the injunction somehow lost all efficacy at midnight June 22, 1938, and has

* The total number of shares is 11,910. (R. 11.) The testimony shows purchases by Thomas in his own name from one broker of 102 shares; purchases from the same broker in the name of T. R. Carlus, ordered, received and paid for by Thomas, of 333 shares. The testimony of Thomas indicates that he has purchased additional shares from other brokers. The Thomas purchases were never registered by him in his own name. (See testimony of Edward Lillig, R. 88-90; Theodore R. Carlus, R. 96; F. Gerald Thomas, R. 91-94, 99-101, 141. See also findings of district court, Nos. 22 and 23, R. 156-158.)

remained a nullity since that midnight hour, therefore has no bearing on the question of the validity of his powers of attorney.

Duration of the injunction:

The petitioners urge that both the district court and the circuit court of appeals first construed the injunction as *temporary*—on petitioners' analysis, effective only until midnight June 22, 1938—but that both courts subsequently reversed themselves and declared the injunction *permanent*, that is, effective beyond June 22, 1938.

This contention is rank sophistry. The district court, on the petition of these respondents, entered an order May 5, 1938 enjoining Thomas "until the further order of this court, from mailing or sending any further general communications to the holders of participating certificates of 4145 Broadway Hotel Company and from soliciting or accepting any powers of attorney from such holders of participating certificates and from using or attempting to use any powers of attorney heretofore obtained by said F. Gerald Thomas from holders of such participating certificates." (R. 9.)

On May 26, 1938, after a hearing on the petition for injunction and the answer thereto filed by Thomas, the court entered a further order, *with the consent of Thomas and his counsel*, "that said F. Gerald Thomas, his agents, attorneys and employes, be and each of them is permanently enjoined and restrained until the further order of this court from mailing or sending any further communications to the holders of participating certificates of 4145 Broadway Hotel Company and from soliciting and accepting any powers of attorney from such holders of participating certificates and from using and attempting to use any powers of attorney heretofore obtained by said F. Gerald Thomas from holders of such participating certificates." (R. 10-11.)

On June 23, 1938, in the district court, Thomas moved the court to dissolve the injunction and this motion was denied. (Record in circuit court of appeals cases Nos. 6696 and 6733, pp. 72-78.)*

On June 24, 1938, in the district court, Thomas prayed an appeal from the order of May 26, 1938 (which appeal in due course became case No. 6733 of the circuit court of appeals) and on July 19, 1938 also obtained leave from the circuit court of appeals to prosecute an appeal from said order of May 26, 1938 (case No. 6696 of the circuit court of appeals). The two appeals were consolidated and were argued and determined at the October 1938 term of the circuit court of appeals. (Petition for rehearing denied December 14, 1938:—100 F. 2d 7.) Thomas did not suggest that the injunction order had long ago become moot, but contended, first, that the district court lacked jurisdiction to enter the order, and second, that the district court had coerced his consent to the injunction. At no time up to December 14, 1938, when the appeals were finally decided, did Thomas urge that the injunction had become *functus officio* at midnight on June 22, 1938, as he now pleads in this court.

The circuit court of appeals, anent the jurisdictional question, pointed out that by filing certain petitions in bankruptcy case No. 56875 of the district court Thomas had subjected himself to the jurisdiction of the court in that case; that the injunction order was prompted by the conduct of Thomas while a litigant before the court; that although leave to file Thomas' "second amended petition" had been denied May 23, 1938, Thomas and his counsel had indicated that Thomas proposed to take an appeal from said order, therefore the district court saw fit on May 26,

* It is stated in the petition for certiorari that a certified copy of this record has been filed in this court. (Petition, p. 19—footnote.)

1938, to extend the preliminary injunction (of May 5, 1938) "permanently * * * until the further order of this court."*

By its explanation of the genesis and purposes of the injunction order, in answer to Thomas' challenge to the jurisdiction of the district court, the circuit court of appeals did not expressly or impliedly hold that the injunction lost all vitality at midnight June 22, 1938 (when, as stated by the petitioners, the time expired for appeal from the order entered May 23, 1938 denying Thomas leave to file his "second amended petition").

Thomas professes surprise that the district court, in its findings and decree of August 6, 1940, applied the injunction of May 26, 1938 as a mandate of the court in full force and effect ever since its issuance; even more, surprise that the circuit court of appeals, in its judgment rendered February 11, 1941, held that the injunction had not automatically become a nullity. There is passing mention in the petition for certiorari of the fact that on March 20, 1939, the district court denied the petition of Thomas (filed February 14, 1939) to vacate or terminate the injunction, on the ground that the injunction had fully served its purpose and had therefore become a nullity. This episode is dismissed with the curious comment that the order of March 20, 1939 "adjudicated nothing * * * it must be assumed that the motion was denied because there was then no such injunction in force." (Petition, pp. 35-36.)

No mention is made in the petition for certiorari of the fact that Thomas filed a petition in the circuit court of appeals (case No. 6932) for leave to appeal from the district

* The word "permanently" made clear that on May 26, 1938, the court did not desire or intend to fix any limit of time on the duration of the injunction. The words "until the further order of this court" were an invitation to Thomas to come into court, at any time he saw fit, and show that by reason of change of circumstances the injunction should be terminated or modified. (*Dealtry* v. *Posse School, Inc.* [CCA 1], 100 F. 2d 470 [10th headnote]; *In re Schroeder Hotel Co.* [CCA 7], 86 F. 2d 491 [particularly last two paragraphs of opinion]).

court order of March 20, 1939 and that leave to appeal was denied. On April 27, 1939 the circuit court of appeals filed a memorandum opinion as follows:

> "*Per curiam.** Petitioner, on February 14, 1939, filed his petition in the district court to vacate and terminate an order of said court entered May 26, 1938 enjoining and restraining the petitioner in certain matters and respects. The petition was denied by the court's order of March 20, 1939 and it is from this order the instant petition for leave to appeal is presented.
>
> "The order of May 26, 1938, sought to be vacated, provides, 'It is ordered that the said F. Gerald Thomas, his agents, attorneys and employes, be and each of them is permanently enjoined and restrained *until the further order of this court,*' from sending out communications, etc., with a view of soliciting powers of attorney from creditors and claimants in the reorganization proceedings. An appeal was taken from this order and decided by this court December 14, 1938, in *In re 4145 Broadway Hotel Company*, 100 F. 2d 7. The jurisdiction and authority of the court to enter the order in controversy was attacked on that appeal. This court held contrary to appellant's contention in that case.
>
> "The petition for leave to appeal and the answer discloses that the court below still has jurisdiction of the bankruptcy proceeding. Appellant complains of the delay in the entry of a final decree and the retention of jurisdiction of the proceeding by the lower court. Whether there is any merit in this claim we are not in a position to determine and, in fact, it is not apparent how that question could be determined on appeal now sought. It is sufficient to note that the court, at the time of the entry of the order now sought to be appealed from, had jurisdiction of the parties and the subject matter.
>
> "Having held the restraining order was properly entered and it appearing that the court retained jurisdiction, we think the question as to when the restraining order should be dissolved is within the discretion

* Before Sparks, Major and Treanor, circuit judges.

of the district court, and that, in view of our former decision, there is no good reason why the appeal should be allowed.

"The petition for leave to appeal is denied."

Since April 27, 1939, when the foregoing opinion was filed, Thomas has not seen fit to request the district court to dissolve or modify the injunction order of May 26, 1938.

Alleged reasons for allowance of certiorari.

(1)

The petitioners urge that the decision rendered by the circuit court of appeals on February 11, 1941, sustaining the order of the district court approving the mortgage loan of $110,000, is in conflict with the decision of the same court rendered October 25, 1938 (rehearing denied December 14, 1938) affirming the injunction order entered against Thomas by the district court on May 26, 1938.

It is contended that both the district court and the circuit court of appeals, in holding invalid Thomas' purported powers of attorney from certificate holders, improperly invoked as one of the grounds for this holding the circumstance that the powers of attorney had been solicited in disregard of the court's injunction.* The petitioners urge that the injunction order of May 26, 1938 has no bearing on the validity of Thomas' powers of attorney; that substantially all of the powers of attorney were procured at various times subsequent to June 22, 1938

* The principle underlying this holding is that in the enforcement of an injunction, the court is not limited to personal punishment of the offender, but may take appropriate action to nullify all things done in derogation of the injunction and to achieve the purposes of the court's jurisdiction;—in this case, the successful reorganization of 4145 Broadway Hotel Company. (Cases cited in circuit court opinion, R. 190; also *In re Schroeder Hotel Co.* [CCA 7] 86 F. 2d 491, 495; *Dealtry* v. *Posse School, Inc.* [CCA 1] 100 F. 2d 470, 473-474; *Keys* v. *Alligood*, 178 N. C. 16, 100 S. E. 113; *Taylor* v. *Hopkins*, 40 Ill. 442, 447-448; *Ashby* v.

and that since that date the injunction order of May 26, 1938 has been a nullity.

From what already appears in the foregoing statement of the case, it is clear that there is no inconsistency between the decision rendered by the circuit court of appeals on October 25, 1938 (100 F. 2d 7) and the decision rendered February 11, 1941 (117 F. 2d 639).

(2), (3) AND (4).

The petitioners contend that the circuit court of appeals by affirming the district court order of August 6, 1940, whereby the debtor corporation was authorized to consummate a mortgage loan of $110,000, "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this honorable court's power of supervision." (Petition, p. 7.)

This point, so far as we can determine, relates to that part of the reorganization decree of March 7, 1935 whereby the court reserved jurisdiction over the stock voting trust, to be created pursuant to the plan of reorganization, and over the trustees "for the purpose of supervising the acts and doings of such trustees and for the purpose in all respects of protecting and safeguarding the rights of the holders of the trust certificates from time to time outstanding." (R. 7—¶ 18 of decree.)

The petitioners charge that the district court reserved jurisdiction "for the apparent purpose of interfering with

Ashby, 62 N. J. Eq. 618, 50 Atl. 473; *McMillan* v. *Barber Asphalt Paving Co.*, 151 Wis. 48, 138 N. W. 94, 97.

The proxies held by Thomas were held void by the district court on the additional and independent ground that they had been obtained by false representations and by the withholding of material information. (Findings of fact Nos. 22, 23, 24:—R. 156-158; findings of law Nos. 10, 11:—R. 151; decretal clauses "J" and "K":—R. 163. See *Securities & Exchange Commission* v. *O'Hara Re-election Committee* [D. C., Mass.], 28 F. Supp. 523, 525.)

collection by state authorities of past due and accruing taxes," then exercised its reserved jurisdiction "to the sole end of depriving scattered and unorganized security holders of their property rights under the reorganization trust agreement of May 1, 1935, by intimidation and otherwise." (Petition, p. 8.)*

The reservation of jurisdiction under the decree of March 7, 1935 was made with the consent of all parties to the reorganization proceedings. Even if it be assumed that the validity or propriety of this reservation of jurisdiction could now be called into question, inspection of the record of this case fails to disclose any objection by the petitioners to the exercise by the court of the reserved jurisdiction. (Answer of Thomas—R. 50; answer of Golding—R. 58.) Thomas alleged (¶ 6 of answer): "Not only the principal reason but the only reason or colorable reason for the failure to have a final decree entered in these proceedings * * * has been the desired purpose and intention of said petitioners, said Rossetter, said McCord and said Rosenthal to hinder, hamper and defeat the public authorities of the state of Illinois in collecting taxes payable by said hotel company, and this respondent charges, on information and belief and advice of counsel, that said failure to have a final decree entered herein was and is therefore contrary to law and a fraud on the part of said Rossetter, said McCord and said Rosenthal upon the people of the state of Illinois, and this respondent respectfully suggests that therefore this honorable court, the situation being called to the court's attention, should forthwith and of its own motion enter a final decree in these proceedings." (R. 51-52.)

* We respectfully suggest that this scandalous accusation against the integrity of the district court—inferentially also against the United States Circuit Court of Appeals for the seventh circuit, which sustained the jurisdiction of the district court and the purposes and manner of its exercise—calls for disciplinary action against the authors. For one thing, we submit, the petition for certiorari should be sticken for impertinence.

Notwithstanding his own suggestion that the court should forthwith end its own jurisdiction in the reorganization case, Thomas entitled his pleading an "answer and counter-claim" and prayed for affirmative relief: that the stock voting trust be decreed to be at an end, or in the alternative that the petitioners (respondents here) be decreed to no longer be trustees under said trust. (R. 56.)

On the appeal taken by the petitioners from district court to the circuit court of appeals, no point was raised either that the district court lacked jurisdiction or should have declined to exercise jurisdiction. (Statement of points on appeal, R. 165-167.)

The petition for certiorari points out no contrariety of decisions regarding the interval of time that may properly be permitted to elapse between the entry of a decree confirming a plan of reorganization and the entry of a final decree closing the case. Manifestly, such interval of time must necessarily depend on the circumstances of the particular case.

Under section 77B of the Bankruptcy Act it was not intended that the entry of a decree approving a plan of reorganization should terminate the jurisdiction of the court. To the contrary, it was expressly provided that "upon final confirmation of the plan, the debtor and other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and control of the judge. * * * Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, if any, making such provisions as may be equitable, by way of injunction or otherwise, and closing the case." (¶ [h])*

* For corresponding provisions of present chapter 10 of the Bankruptcy Act, as amended June 22, 1938, see 11 U. S. C. A. §§ 621-628.

The irony of the situation is that when, after five years of anxious, patient and skilful maneuvering to avoid forfeiture of the corporate property for nonpayment of the old 1927-1934 tax balances, the stock trustees finally succeeded in developing a practical program for settlement of the old tax arrearages, upon terms satisfactory to the tax-collecting officers of Cook County, Illinois, it was Thomas and his associates who alone opposed this program and who now berate the stock trustees and the district court for using the jurisdiction reserved in the 1935 decree in aid of the tax-payment program.

(5)

"And for your petitioner F. Gerald Thomas, it is a matter of personal liberty." (Petition, p. 8.) Whether the 4145 Broadway Hotel Company should make a mortgage loan of $110,000, to pay taxes and for other corporate purposes, is not a matter of personal liberty to F. Gerald Thomas. In the controversy determined by the district court order of August 6, 1940 and the circuit court judgment of February 11, 1941, the personal liberty of Thomas was not involved.

However, as appears elsewhere in the petition (p. 14), there is now pending in the district court a proceeding instituted by these respondents on April 18, 1941 charging Thomas with contempt of court by reason of writing and sending certain circular letters to certificate holders on March 15, 1941, March 17, 1941, and April 5, 1941.* In advance of the hearing to be held by the district court on the contempt petition filed April 18, 1941 and the answer thereto filed by Thomas May 3, 1941, Thomas apparently conceives that his contemptuous conduct may bring upon him punishment of imprisonment. Starting with this prophetic

* See motion of F. Gerald Thomas for stay order, presented to Mr. Justice Murphy on May 17, 1941 and denied May 20, 1941.

anticipation, by a devious turn of logic he arrives at the conclusion that his personal liberty is threatened by the district court order of August 6, 1940 and the judgment of the circuit court of appeals affirming this order. Because, as he reasons, he could escape the penalties of his contemptuous conduct if he could now obtain from this court a declaration that the injunction order which he has further flaunted—with full cognizance of the district court order of August 6, 1940 and the circuit court judgment of February 11, 1941—automatically became a nullity at midnight June 22, 1938. Enough has already been said, we believe, to make clear that the validity of the 1938 injunction was not at issue in the 1940 phase of the proceedings in the district court, but only the question whether powers of attorney obtained by Thomas in flagrant violation of the injunction should be honored. Whether Thomas was at liberty to flaunt the injunction by acts done during March and April of 1941—the nature of which this court is not informed by the record at hand—is a question that must await the judgment of the district court on the pending contempt charges and appeal, if any, from such judgment.

Conclusion.

The petition for certiorari, we respectfully urge, shows no sufficient reason (under rule 38 of this court) for the grant of such writ.

Respectfully submitted,

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